STATE OF MICHIGAN

COURT OF APPEALS

TED DOORENBOS, Plaintiff-Appellant,	UNPUBLISHED October 16, 2008
v	No. 279998 Kent Circuit Court
ALPINE TOWNSHIP, Defendant-Appellee.	LC No. 04-012521-CZ

Before: Markey, P.J., and Sawyer and Kelly, JJ.

PER CURIAM.

In this zoning case, plaintiff appeals by right the trial court's order granting defendant's motion for summary disposition. The trial court determined that there was no genuine issue as to any material fact regarding plaintiff's claim that the application of defendant's zoning ordinance to a 45-acre parcel of property resulted in a "temporary" taking for which plaintiff was entitled to just compensation under Const 1963, art 10, § 2. The township twice granted plaintiff's petition to rezone the property, between which the electorate had rejected the amendment in a referendum. The court ruled plaintiff had no viable constitutional takings claim because plaintiff was not deprived of the use of the property; the township had not engaged in extraordinary delay in acting on plaintiff's rezoning application, and that plaintiff's claims were otherwise moot. Consequently, the court ruled that defendant was entitled to judgment as a matter of law. MCR 2.116(C)(10). We affirm.

I. Summary of Facts and Proceedings

Plaintiff purchased 168 acres of farmland in Alpine Township for $188,967 in 1987; he intended to hold the property as an investment for his retirement. When plaintiff purchased the property, it was zoned "AG" for agricultural uses and was actively farmed at the time. Over the years plaintiff continued to lease the property for farming operations to defray real estate taxes. On February 28, 2002, plaintiff sold a 45-acre parcel of the original 168 acres on a land contract to Sable Developing, Inc. for $24,000 an acre. In March 2002, plaintiff joined Sable in applying to the township planning commission to rezone the 45-acre parcel from "AG" to "R-1," or low-density residential. After conducting the necessary hearings and review, the township approved the rezoning request on August 19, 2002. The timeline below details subsequent events:

- October 21, 2002: sufficient citizen petitions were filed with the township requiring a referendum vote for the zoning amendment;

- August 9, 2003: Sable, which had filed a lawsuit against the township while its rezoning application was pending, quit-claimed the subject property back to plaintiff in lieu of foreclosure;

- January 29, 2004: the Sable lawsuit was dismissed for lack of progress;

- August 3, 2004: voters reject the amendment in the referendum election;

- December 23, 2004: plaintiff filed the instant lawsuit against the township alleging that the application of the zoning ordinance to the 45-acre parcel violated substantive due process, equal protection, and constituted a taking of property without just compensation contrary to Const 1963, art 10, § 2 (the last claim is the only one remaining);

- December 16, 2005: plaintiff filed a new application to rezone the subject property from "AG" to "R-1";

- May 15, 2006: the township approved the petition amending its zoning ordinance to change the subject property from "AG" to "R-1"; no timely petition for a referendum was filed.

On appeal, plaintiff contends that he is entitled to just compensation for the "temporary" taking of the subject property from the time the petitions for a referendum were certified in October 2002 until the property was rezoned in May 2006. He asserts during that period of time he was deprived of economically viable use of the property. Plaintiff's counsel stated his theory of damages at oral argument on defendant's motion for summary disposition:

> Our position ultimately is this, that there was a temporary taking in this case, because when Mr. Doorenbos had the contract for sale for [$]24,000 an acre with Sable, at one point in December 2005 he had offers for [$]30,000 an acre, contingent upon rezoning.
>
> So I think it's a little hard for the Court to take that deposition testimony as fact in this case when the value was contingent on rezoning and the property was not rezoned at that time. As it happened, the bottom fell out of the development market in Alpine about that time. Mr. Doorenbos right now can't give the property away for $15,000 an acre. We know it's not worth $30,000 anymore and we doubt it's worth $15,000, because he can't sell it at that price. [Hearing, July 20, 2007, p 17.]

The trial court disagreed, reasoning as follows:

> It's the Court's determination and decision here today that there's no viable constitutional taking here or takings claim, whether temporary or otherwise.

* * *

> The plaintiff had use of the property. There was no extraordinary delay on the part of the township, and it's the Court's determination that plaintiff's claims for relief are moot and the motion is granted. [Hearing, July 20, 2007, p 21.]

II. Standard of Review

> We review a trial court's determination regarding a motion for summary disposition de novo. A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in the light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists. Summary disposition is appropriate only if there are no genuine issues of material fact and if the moving party is entitled to judgment as a matter of law. We also review issues of constitutional law de novo. [*Dorman v Clinton Twp*, 269 Mich App 638, 644; 714 NW2d 350 (2006) (citations, quotations, and other punctuation omitted).]

III. The Legal Framework

The United States Constitution prohibits the federal government from taking private property without providing its owner just compensation. The pertinent clause in the Fifth Amendment "provides in relevant part that 'private property [shall not] be taken for public use, without just compensation.'" *First English Evangelical Lutheran Church v Los Angeles County*, 482 US 304, 314; 107 S Ct 2378; 96 L Ed 2d 250 (1987). The Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Id*. at 315. "The Fifth Amendment's Taking Clause is applied to the states through the Fourteenth Amendment." *K & K Const, Inc v Dep't of Natural Resources*, 456 Mich 570, 576 n 3; 575 NW2d 531 (1998) (*K & K Const I*), citing *Penn Central Transportation Co v New York City*, 438 US 104, 122; 98 S Ct 2646; 57 L Ed 2d 631 (1978). In addition, Michigan's Constitution provides: "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record." Const 1963, art 10, § 2.

The government is not constitutionally prohibited from taking private property for public use; rather, it is only required to pay property owners just compensation when it does so. Thus, the government may take private property through the power of eminent domain and formal condemnation proceedings. *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 129; 680 NW2d 485 (2004). But the government may also effectively "take" private property without formal condemnation proceedings when it overburdens the property with regulations. *K & K Const I, supra* at 576. "'[T]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'" *Id*. quoting *Pennsylvania Coal Co v Mahon*, 260 US 393, 415; 43 S. Ct. 158; 67 L. Ed. 322 (1922). Our Supreme Court outlined the analysis applicable to claims of "regulatory" takings as follows:

> While all taking cases require a case-specific inquiry, courts have found that land use regulations effectuate a taking in two general situations: (1) where the

regulation does not substantially advance a legitimate state interest,[1] or (2) where the regulation denies an owner economically viable use of his land. *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 485; 107 S Ct 1232; 94 L Ed 2d 472 (1987).

The second type of taking, where the regulation denies an owner of economically viable use of land, is further subdivided into two situations: (a) a "categorical" taking, where the owner is deprived of "all economically beneficial or productive use of land," *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015; 112 S Ct 2886; 120 L Ed 2d 798 (1992); or (b) a taking recognized on the basis of the application of the traditional "balancing test" established in *Penn Central Transportation Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

In the former situation, the categorical taking, a reviewing court need not apply a case-specific analysis, and the owner should automatically recover for a taking of his property. *Lucas*, *supra* 505 US at 1015. A person may recover for this type of taking in the case of a physical invasion of his property by the government (not at issue in this case), or where a regulation forces an owner to "sacrifice *all* economically beneficial uses [of his land] in the name of the common good . . . ." *Id.* at 1019 (emphasis in original). In the latter situation, the balancing test, a reviewing court must engage in an "ad hoc, factual inquiry," centering on three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations. *Penn Central*, 438 US at 124. [*K & K Const I*, *supra* at 576-577.]

IV. Analysis

The essence of plaintiff's argument on appeal is that the trial court erred in granting defendant summary disposition because material disputed issues facts remain to be resolved in applying the *Penn Central* "balancing test" to his "temporary" regulatory taking claim. Defendant argues on appeal that the trial court correctly granted it summary disposition because plaintiff was never denied all use of his property. Defendant argues that under the seminal case of *First English*, *supra*, a government regulation must deny all use of property before there exists a viable claim for just compensation because of a "temporary" taking. We conclude defendant's argument has arguable merit but even applying the *Penn Central* balancing test, we find on de novo review that the undisputed material facts here entitle defendant to judgment as a matter of law.

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[1] We note that the United States Supreme Court subsequently decided that although whether a regulation "substantially advances a legitimate state interest" is an appropriate consideration in a substantive due process challenge, the test "is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment." *Lingle v Chevron USA, Inc.*, 544 US 528, 541; 125 S Ct 2074; 161 L Ed 2d 876 (2005).

The Court in *First English* accepted as true the plaintiff's allegation that a flood-plain ordinance denied it *all use* of its camp property near a riverbed. *First English*, *supra* at 313, 321. The Court held that once a court finds that a "taking" has occurred, the Fifth Amendment commands just compensation even though the taking was only temporary. *Id*. at 316, 321. The Court opined, "We merely hold that where the government's activities have already worked a taking of *all use* of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id*. at 321 (emphasis added). The Court also carefully limited its holding to the facts before it, concluding, "we must assume that the Los Angeles County ordinance has denied appellant *all use* of its property for a considerable period of years, and we hold that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy." *Id*. at 322 (emphasis added). Importantly, the Court specifically noted that its analysis did not address "the quite different questions that would arise in the case of normal delays in obtaining building permits, *changes in zoning ordinances*, variances, and the like which are not before us. *Id*. (emphasis added). On remand, the California Court of Appeals held in a lengthy, scholarly opinion that the plaintiff's takings claim was properly dismissed because, among other reasons, the county ordinance had not deprived the plaintiff of *all use* of its property. *First English Evangelical Lutheran Church v Los Angeles County*, 210 Cal App 3d 1353, 1365-1372; 258 Cal Rptr 893 (1989).

This Court has applied the holding of *First English*: When a regulatory taking has been found, the injured party is owed just compensation even though the taking was only temporary. *Poirier v Grand Blanc Twp*, 167 Mich App 770; 423 NW2d 351 (1988). The underlying facts of *Poirier* are similar to the present case. The plaintiff in *Poirier* owned a mobile home park. He purchased adjacent property to expand the park. The township approved an amendment of the zoning ordinance to permit the expansion but a referendum vote overruled the zoning amendment. The trial court found that a taking had occurred but ruled that the plaintiff was not entitled to damages, i.e., just compensation. The plaintiff appealed the trial court's ruling regarding damages, but significantly, the township did not appeal the trial court's finding that an unconstitutional taking without just compensation had occurred. The *Poirier* Court held that "where there has been a finding of an unconstitutional taking of private property without compensation, the property owner is entitled under the Michigan Constitution to compensation for the period during which the taking was effective." *Id*. at 777. The Court denied the township's request to remand the case to the lower court to permit moving for reconsideration on whether a taking had, in fact, occurred. This Court reasoned that had the township desired to dispute "the lower court's finding that the zoning was unconstitutional or resulted in a taking, they should have appealed the order to rezone and properly briefed the issue." *Id*. So, *Poirier* is not authority for the proposition that a temporary taking requiring just compensation may be established by a government regulation that limits but does not deny all use of a property. That question was never before the Court. Indeed, on subsequent appeal after remand, this Court observed that implicit in the lower court's finding a taking had occurred was a finding that the property had no value as it was zoned. *Poirier v Grand Blanc Twp (After Remand)*, 192 Mich App 539, 546-547; 481 NW2d 762 (1992).

Although our Supreme has recognized *Poirier* and *First English*, see *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 90, 445 NW2d 61 (1989), the Court has not specifically adopted the concept of a "temporary" taking. Before *First English* was decided, our Supreme Court

found the concept of a "temporary" taking "intriguing". See *Schwartz v City of Flint*, 426 Mich 295, 314-315 n 14; 395 NW2d 678 (1986). The Court has held that where a zoning ordinance creates essentially "worthless" "dead land," a taking requiring just compensation has occurred. *Spanich v City of Livonia*, 355 Mich 252, 265-266; 94 NW2d 62 (1959).

Our Supreme Court's decision in *K & K Const I, supra*, arguably supports a regulatory "temporary" taking claim based on facts establishing something less than a "categorical" taking rendering property worthless. In *K & K Const I*, the lower court held that the denial of a wetlands permit had rendered a parcel of property worthless, and after the DNR partially relented, a temporary taking had occurred as to part of the property. *Id*. at 575. Our Supreme Court held that this Court and the lower court erred by not considering the plaintiff's other contiguous, adjacent properties in analyzing whether a taking had occurred. *Id*. at 578. The Court held a "categorical" taking had not occurred because the plaintiff could still develop other parts of properties. *Id*. at 585-597. But the Court remanded the case to the trial court to determine whether considering all the plaintiff's adjacent properties, a taking had occurred under the "balancing test" established in *Penn Central*. On remand, the trial court again found that a taking had occurred, but this Court reversed. *K & K Const, Inc v Dep't of Environmental Quality*, 267 Mich App 523; 705 NW2d 365 (2005) (*K & K Const II*). This Court's observation regarding the plaintiff's "temporary" taking claim is instructive:

> We note that the United States Supreme Court rejected a "temporary taking" claim in *Tahoe-Sierra* [*Preservation Council, Inc v Tahoe Regional Planning Agency*, 535 US 302; 122 S Ct 1465; 152 L Ed.2d 517 (2002)], *supra* at 330-335. The Court reasoned that requiring a governmental agency to compensate a property owner for the loss of value while considering applications for permits and variances under a land-use regulatory scheme would either become cost-prohibitive or lead to governmental agencies making hasty, presumably haphazard, decisions. *Id.* at 334-335. [*K & K Const II, supra* at 536 n 17.]

In *Tahoe-Sierra*, the Court considered whether a categorical ban on all residential development for a period of 32 months amounted to a "temporary" taking of all use requiring just compensation under the analysis of *First English*. The district court found that the property owners had been temporarily deprived of all economically viable use of their land during the moratorium on development, and were owed just compensation. *Tahoe-Sierra, supra* at 316-317. The Ninth Circuit Court of Appeals "held that because the regulations had only a temporary impact on [the] petitioners' fee interest in the properties, no categorical taking had occurred." *Id.* at 318. The Supreme Court rejected the petitioner's argument that "a temporary deprivation -- no matter how brief -- of all economically viable use [would] trigger a *per se* rule that a taking has occurred." *Id*. 320-321. A *per se* rule could not be applied because whether a taking occurs "depends upon the particular circumstances of the case" analyzed under the *Penn Central* framework. *Id*. at 321. The Court observed that regulatory takings are quite different from categorical takings of the whole or part of a property for public use. *Id*. at 323. Further, the Court noted that "[l]and-use regulations are ubiquitous and most of them impact property values in some tangential way -- often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford." *Id*. at 324. Rather, whether a "regulatory taking" has occurred requires an "ad hoc" factual inquiry to determine if the regulation went too far. *Id*. at 325-326. In making the required multi-

factor analysis to determine whether a regulatory taking exists, the focus must be on "'the parcel as a whole.'" *Tahoe-Sierra*, *supra* at 327, quoting *Penn Central*, *supra* at 130-131.

In discussing *First English*, the *Tahoe-Sierra* Court pointed out that case had not decided whether the regulation at issue had actually resulted in a temporary taking and suggested that the regulation in that case might not have effected a taking either because the government action was insulated by the "'State's authority to enact safety regulations'" or because "'the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like . . . .'" *Tahoe-Sierra*, *supra* at 328-329, quoting *First English*, supra at 313, 321. The Court observed where a categorical taking has not occurred, the *Penn Central* balancing test must be applied. *Tahoe-Sierra*, *supra* at 330. The Court found that applying the balancing analysis only to discrete temporal segments of fee ownership would be problematic because "every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings." *Id*. at 331. Thus, the Court concluded both the geographic dimensions and the temporal dimensions of the owner's interest must be considered when applying the *Penn Central* balancing test. *Id* at 331-332. The Court further explained:

> Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted. Cf. *Agins v City of Tiburon*, 447 US [255] at 263, n 9[; 100 S Ct 2138; 65 L Ed 2d 106 (1980)] ("Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense'") (quoting *Danforth v United States*, 308 US 271, 285; 60 S Ct 231; 84 L. Ed. 240 (1939))). [*Tahoe-Sierra*, *supra* at 332.]

Ultimately, the *Tahoe-Sierra* Court declined to adopt a bright-line rule to be applied to cases of claimed temporary regulatory takings. *Id*. at 332-342. The Court concluded, "the interest in 'fairness and justice' will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule." *Tahoe-Sierra*, *supra* at 342. Considering a case involving two moratoria lasting 32 months and banning virtually all residential development, the Court held petitioners could not recover under a *Penn Central* analysis "because petitioners expressly disavowed that theory, and because they did not appeal from the District Court's conclusion that the evidence would not support it." *Tahoe-Sierra*, *supra* at 334. In sum, the *Penn Central* balancing test applies to claims of "temporary" regulatory takings. But even a total ban on use of the property for considerable time periods will not necessarily require just compensation. Further, including the temporal factor in the balancing test renders it a rare case indeed where a temporary regulation that does not deny all use of the property triggers the constitutional requirement of just compensation.

The last conclusion above is buttressed by the fact that even a permanent deprivation of some but not all use of a property does not render a zoning ordinance unconstitutional. "[I]t is well established that a municipality is not required to zone property for its most profitable use, and that '[m]ere diminution in value does not amount to [a] taking.'" *Dorman, supra* at 647 (citations omitted). Rather, "[a] plaintiff who asserts that he was 'denied economically viable use of his land' must show something more-'"'that the property was either unsuitable for use as zoned or unmarketable as zoned."'" *Id*. (citations omitted). See also, *K & K Const II, supra* at 553-554 n 32 ("[T]he [United States] Supreme Court has held time and again that even a significant diminution in value is not enough on its own to establish a regulatory taking."). The *Penn Central* Court rejected the argument that the regulation at issue resulted in a taking because its operation significantly diminished the value of Penn Central's property, opining:

> Appellants concede that the decisions sustaining other land-use regulations, which, like the New York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a "taking," see *Euclid v Ambler Realty Co*., 272 US 365[; 47 S Ct 114; 71 L Ed 303] (1926) (75% diminution in value caused by zoning law); *Hadacheck v Sebastian*, 239 US 394 [; 36 S Ct 143; 60 L Ed 348] (1915) (87 1/2% diminution in value); cf. *Eastlake v Forest City Enterprises, Inc*, 426 US [668], at 674 n 8[; 96 S Ct 2358; 49 L Ed 2d 132 (1976)], and that the "taking" issue in these contexts is resolved by focusing on the uses the regulations permit. [*Penn Central*, *supra* at 131.]

Application of the principles stated above to the undisputed material facts in this case confirms that the trial court correctly determined that plaintiff failed to establish a constitutional taking of property, whether temporary or permanent. Plaintiff at all times was permitted any use of the property allowed in an "AG" zone. The property was used for agricultural purposes when plaintiff purchased the property, and he continued using it for farming. Plaintiff was also able to sell the 45-acre parcel at a considerable profit. Although that deal fell through, it is clear from counsel's argument below that plaintiff's chief complaint regarding diminution of value is one of timing and fluctuating market values. In *Eastlake, supra*, the Court upheld against a due process challenge the submission of a proposed amendment to a zoning ordinance to a referendum vote. The cited footnote is particularly apropos here:

> By its nature, zoning "interferes" significantly with owners' uses of property. It is hornbook law that "[m]ere diminution of market value or interference with the property owner's personal plans and desires relative to his property is insufficient to invalidate a zoning ordinance or to entitle him to a variance or rezoning." 8 E. McQuillan, Municipal Corporations § 25.44, p 111 (3d ed., 1965). There is, of course, no contention in this case that the existing zoning classification renders respondent's property valueless or otherwise diminishes its value below the value when respondent acquired it. [*Eastlake, supra*, 426 US at 674 n 8.]

Here, we reach the same conclusion by applying the *Penn Central* balancing test to the undisputed material facts. First, with regard to the character of the government action, it is well established that government may exercise its police powers and adopt zoning laws that regulate where certain uses are permitted or prohibited. Zoning is valid unless no reasonable governmental interest is advanced by the chosen classifications, or the classifications are

unreasonable because they are purely arbitrary, capricious, or baselessly exclude a legitimate land use from an entire area. *Dorman*, *supra* at 650-651. Plaintiff has abandoned any claim the zoning ordinance violates substantive due process either on its face or as applied.

Furthermore, under this first factor, the "relevant inquiries are whether the governmental regulation singles [the] plaintiffs out to bear the burden for the public good and whether the [regulation] being challenged . . . is a comprehensive, broadly based regulatory scheme that burdens and benefits all citizens relatively equally." *K & K Const II*, *supra* at 559. Because the ordinance here is one imposing traditional zoning as part of a comprehensive plan and plaintiff is both benefited and burdened like other similarly situated property owners, "this factor weighs heavily against finding that a compensable regulatory taking has occurred here." *Id*. at 563.

Moreover, the submission of the proposed zoning amendment to a referendum is part of the lawful political process one seeking an amendment may reasonably expect to endure. See *Eastlake*, *supra*. Plaintiff acquired no vested right to the amended zoning classification after the township first adopted it. *Dorman*, *supra* at 649. And, as discussed above, the normal decision-making process of reviewing proposed changes to a zoning ordinance was not envisioned as being a "temporary" taking. *First English*, *supra* at 322. The trial court correctly concluded defendant did not unreasonably delay in processing plaintiff's rezoning application so as to militate toward the conclusion a temporary taking occurred.

The economic effect of the zoning classification on the property also does not support the conclusion there was a temporary taking. Plaintiff's only claim is that is that he was unable to profit as much as he had hoped; specifically he lost market opportunities. As noted above, "a municipality is not required to zone property for its most profitable use, and [the mere] diminution in value does not amount to [a] taking.'" *Dorman*, *supra* at 647 (citations omitted). "A reduction in the value of the regulated property is insufficient, standing alone, to establish a compensable regulatory taking." *K & K Const II*, *supra* at 553. This factor does not support finding a temporary taking on these facts.

Finally, the extent to which the regulation has interfered with plaintiff's distinct investment-backed expectations favors finding that no regulatory taking occurred. Plaintiff's plan was simple: buy farmland and hold it until it appreciated in value and could be sold or developed at a profit. The property was zoned "AG" when plaintiff acquired it, but this did not prevent plaintiff from selling a 45-acre portion of the property for 21 times the price per acre he paid for it. Because the property was zoned "AG" when plaintiff purchased it, he must have known that rezoning would be necessary before greater residential development would be possible. Further, in weighing the *Penn Central* balancing factors as applied to a particular parcel, both the geographic dimensions and the temporal dimensions of the owner's interest must be considered. *Tahoe-Sierra*, *supra* at 331-332. In this case, the 45-acre parcel was only part of larger 168-acre tract and plaintiff's temporal interest was an indeterminate fee simple. Plaintiff's real complaint is that market conditions changed during the rezoning process. "Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." *Tahoe-Sierra*, *supra* at 332 (citations omitted).

We conclude that applying all the *Penn Central* factors confirms that a regulatory "temporary" taking requiring just compensation did not occur in this case. *K & K Const II*,

supra at 563. The trial court correctly ruled that plaintiff failed to create a factual dispute that the zoning ordinance amounted to a regulatory taking of his property. *Dorman*, *supra* at 646-647.

We affirm.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly